

MAR 2 1984

ALEXANDER L. STEVAS.
CLERK

No. 83-1056

In the Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF
EQUALIZATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
To the Supreme Court of Oklahoma

**INDEPENDENT SCHOOL DISTRICT
NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA,
FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

LANA JEANNE TYREE

Counsel of Record

444 First City Place

Oklahoma City, Oklahoma 73102

Tel. (405) 239-2521

*Counsel for Independent School
District No. 52 of Oklahoma
County, Oklahoma*

March, 1984

No. 83-1056

In the
Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF
EQUALIZATION, ET AL.,
Respondents.

**MOTION OF INDEPENDENT SCHOOL DISTRICT
NO. 52 OF OKLAHOMA COUNTY, OKLAHOMA,
FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

Independent School District No. 52 of Oklahoma County, Oklahoma, pursuant to Rule 36.1 and 36.4 of the Rules of this Court, respectfully requests leave to file a brief *amicus curiae* in opposition to the Petition for Writ of Certiorari.

Independent School District No. 52 of Oklahoma County, Oklahoma, is a political subdivision of the State of Oklahoma and its counsel of record herein is its authorized legal representative and, therefore, pursuant to Rule 36.4 of the Rules of this Court, consent to the filing of this brief *amicus curiae* is not necessary.

Counsel of record for Petitioner, Respondents, and Respondent-Intervenors have given their consent, in writing, to the filing of this *amicus curiae* brief by Independent School District No. 52 of Oklahoma County, Oklahoma, which is accompanied herewith.

Applicant is the primary beneficiary of the ad valorem tax proceeds herein at issue being entitled to approximately sixty-five percent (65%) of all such funds lawfully assessed and collected.

WHEREFORE, Independent School District No. 52 of Oklahoma County, Oklahoma, herewith submits and, to the extent necessary, requests leave to file a brief *amicus curiae*.

Dated this 2nd day of March, 1984.

Respectfully submitted,

LANA JEANNE TYREE

Counsel of Record

444 First City Place

Oklahoma City, Oklahoma 73102

Tel. (405) 239-2521

Counsel for Independent

School District No. 52 of

Oklahoma County, Oklahoma

TABLE OF CONTENTS

	PAGE
Interest of Amicus Curiae	1
Summary of Argument	1
Argument:	
I. No Federal Question Is Presented and This Court Is Without Jurisdiction As the Decision Below Rests Exclusively Upon 1907 Constitutional Provisions and No Law Subsequent to the Alleged Contract Was Enacted, Considered or Enforced	2
II. The Decision Below Was Correctly Decided Solely Based Upon Pre-existing State Constitutional Prohibitions Against Ad Valorem Exemptions	4
A. The State Court Determined That State Law in Existence at the Time the Contract Was Allegedly Made Precluded Contracts of Exemption from Ad Valorem Taxation and No Federal Question Is Herein Presented	5
B. Petitioner Failed to Establish the Existence of a Contract of Exemption from Ad Valorem Taxation	9
III. Petitioners Have Failed to Specify Any Law Passed or Legislative Enactment Subsequent to the Alleged Contract Which Impaired Its Obligations	12
IV. The Record of These Proceedings Negates Any Valid Claim of Deprivation of Property Without Due Process	16
V. This Court Is Without Jurisdiction to Impose Equitable Remedies Not Constitutionally Compelled or to Review the Relief Accorded in an	

TABLE OF CONTENTS CONTINUED

PAGE(S)

Action at Law Where No Federal Question Is Presented	17
VI. The Decision Below Is Not of National or Wide-Spread Significance and Will Affect Few, If Any, Other than the Parties Hereto	18
Conclusion	20

TABLE OF AUTHORITIES

Cases	PAGE(s)
<i>Atlantic Coast Line Ry. Co. v. Phillips</i> , 322 U.S. 168 (1947)	19
<i>Austin Nichols & Co. v. Okla. County Bd. of Tax Roll Corrections</i> , 578 P.2d 1200 (Okla. 1978)	10
<i>Bert Smith Road Machinery v. Oklahoma Tax Commission</i> , 563 P.2d 641 (Okla. 1977)	11
<i>Board of County Comm'rs of Okla. County v. Ryan</i> , 232 P. 834 (Okla. 1925)	8
<i>Central Land Co. v. Laidley</i> , 159 U.S. 103 (1895)	3, 14, 17
<i>Cleveland & Pittsburgh Ry. Co. v. Cleveland</i> , 235 U.S. 50 (1914)	14
<i>County Assessors v. Carpenters and Joiners Local No. 329</i> , 211 P.2d 790 (Okla. 1949)	8
<i>Cross Lake Shooting & Fishing Club v. Louisiana</i> , 224 U.S. 632 (1912)	3, 14, 16
<i>Fisher v. City of New Orleans</i> , 218 U.S. 438 (1910)	3
<i>Fleming v. Fleming</i> , 264 U.S. 29 (1924)	14
<i>Fullerton v. Hughes</i> , 145 P.2d 943 (Okla. 1944)	7
<i>Gammil v. Shackelford</i> , 480 P.2d 920 (Okla. 1970)	8
<i>Gelpcke v. City of Dubuque</i> , 68 U.S. 175 (1864)	13
<i>Grand River Dam Authority v. State</i> , 645 P.2d 1011 (Okla. 1982)	15
<i>Great Northern Ry. Co. v. Sunburst</i> , 287 U.S. 358 (1932)	17
<i>Hawks v. Bland</i> , 9 P.2d 720 (Okla. 1932)	8
<i>Homestake Production Co. v. Board of Equalization</i> , 416 P.2d 917 (Okla. 1966)	8
<i>Hyde v. Altus</i> , 218 P. 1081 (Okla. 1923)	8
<i>Illinois Central R. Co. v. Minnesota</i> , 309 U.S. 157 (1940)	17, 18

AUTHORITIES CONTINUED

PAGE(S)

<i>In re Afton</i> , 144 P. 184 (Okla. 1914)	8
<i>In re Thomas' Estate</i> , 136 P.2d 929 (Okla. 1943)	8
<i>Keokuk & Western R.R. v. Missouri</i> , 152 U.S. 301 (1894)	19
<i>Kryger v. Wilson</i> , 242 U.S. 171 (1916)	14
<i>Linkletter v. Walker</i> , 381 U.S. 618 (1965)	17
<i>Little Rock & Ft. Smith Ry. v. Worthen</i> , 120 U.S. 97 (1887)	7, 19
<i>London Square Village, Inc. v. Okla. County Equalization Bd.</i> , 559 P.2d 1224 (Okla. 1977)	10
<i>Long Sault Development Co. v. Call</i> , 242 U.S. 272 (1916)	3
<i>Louisville & Nashville R.R. v. Palmes</i> , 109 U.S. 244 (1883)	7, 19
<i>Memphis & Charleston R.R. Co., et al. v. Gaines</i> , 97 U.S. 697 (1878)	7, 19
<i>Myers v. Okla. Tax Commission</i> , 303 P.2d 443 (Okla. 1956)	8
<i>New Butler v. Tucker</i> , 153 P. 628 (Okla. 1915)	8
<i>New Orleans Waterworks v. Louisiana Sugar Refining Co.</i> , 125 U.S. 18 (1887)	4, 16
<i>New York Rapid Transit Corp. v. City of New York</i> 303 U.S. 573 (1938)	4, 10, 12
<i>Norton v. Shelby</i> , 118 U.S. 425 (1886)	7
<i>Oklahoma City v. Shields</i> , 100 P. 559 (Okla. 1908)	10
<i>People of New York v. Gilchrist</i> , 262 U.S. 94 (1923)	19
<i>People of New York, et al. v. State Board of Tax Commissioners</i> , 199 U.S. 1 (1905)	10
<i>Perry v. Norfolk</i> , 220 U.S. 472 (1911)	4, 12, 20
<i>Ross v. State of Oregon</i> , 227 U.S. 150 (1913)	3, 14
<i>Seton Hall College v. Village of South Orange</i> , 242 U.S. 100 (1916)	10
<i>Shaw v. Grumbine</i> , 278 P. 278 (Okla. 1929)	7

AUTHORITIES CONTINUED

PAGE(S)

<i>S.R.A. v. Minnesota</i> , 327 U.S. 558 (1946)	20
<i>State ex rel. Tharel v. Board of Comm'rs of</i> <i>Creek Co.</i> , 107 P.2d 542 (Okla. 1940)	8
<i>Tidal Oil v. Flanagan</i> , 263 U.S. 444 (1924)	13
<i>Tucker v. Ferguson</i> , 89 U.S. 527 (1875)	4, 10
<i>Vicksburg, Shreveport & Pacific R.R. Co. v. Dennis</i> , 116 U.S. 665 (1886)	4, 10
<i>Wells v. Savannah</i> , 181 U.S. 531 (1901)	7, 10, 11, 20
<i>Yazoo & Miss. Valley R.R. Co. v. Adams</i> , 180 U.S. 1 (1900)	7, 19
<i>Zane v. Hamilton County</i> , 189 U.S. 370 (1903)	7, 20

Oklahoma Constitution

Article 4, §1	14
Article 5, §1	14
Article 5, §50	6
Article 5, §51	6
Article 6, §1	14
Article 10, §5	5, 6
Article 10, §8	7
Article 10, §9	9
Article 10, §15	6

Statutes

74 OKLA. STAT. §18b(e)	15
------------------------------	----

No. 83-1056

In the
Supreme Court of the United States

OCTOBER TERM, 1983

GENERAL MOTORS CORPORATION,
Petitioner,

v.

OKLAHOMA COUNTY BOARD OF
EQUALIZATION, ET AL.,
Respondents.

**AMICUS CURIAE BRIEF OF INDEPENDENT SCHOOL
DISTRICT NO. 52 OF OKLAHOMA COUNTY, OK-
LAHOMA, IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

INTEREST OF AMICUS CURIAE

Independent School District No. 52 of Oklahoma County, Oklahoma, is the primary constitutionally specified beneficiary of the ad valorem taxes herein at issue being entitled to approximately sixty-five percent (65%) of the taxes herein assessed.

SUMMARY OF ARGUMENT

The state court ruled that petitioners alleged contract of exemption from ad valorem taxation even if assumed to exist, is unconstitutional, unauthorized and void based solely on state constitutional provisions existing since statehood. The court, therefore, affirmed the assessment.

The Petition for Writ of Certiorari which claims impairment of contract by "an unforeshadowed state Attorney General's opinion and state court decisions" presents no federal question. Neither judicial decisions nor Attorney General's opinions are "laws" within contemplation of the contracts clause. No law or legislative enactment subsequent to the alleged contract was upheld, enforced or considered by the court below.

The record of these proceedings negates any deprivation of property without due process of law over which this court has or should exercise jurisdiction.

The Federal Constitution neither prohibits nor requires prospective application. This issue, seeking to compel an equitable remedy in an action at law, presents no federal question for review.

The decision below will affect only the parties hereto, was correctly decided, and was resolved solely on issues of state law and not properly subject to review.

I. No Federal Question Is Presented and This Court Is Without Jurisdiction as the Decision Below Rests Exclusively Upon 1907 Constitutional Provisions and No Law Subsequent to the Alleged Contract Was Enacted, Considered or Enforced.

As will be hereinafter established and readily observed the Court below, relying exclusively on 1907 constitutional provisions in effect since statehood, held that there is no power or authority to grant valid ad valorem exemptions under state law. No law or legislative act passed subsequent to the alleged contract of exemption was enacted, enforced, upheld or considered by the court below.

This Court has consistently held that where the state court did not purport to rely upon or enforce any legislative enactment subsequent to the contract alleged to be impaired no substantial federal question is presented and this Court is without jurisdiction. *Ross v. State of Oregon*, 227 U.S. 150 (1913); *Central Land Co. v. Laidley*, 159 U.S. 103 (1895); *Long Sault Development Co. v. Call*, 242 U.S. 272 (1916).

"The [contracts] clause . . . is not directed against all impairment of contract obligations, but only against such as results from a *subsequent* exertion of the legislative power of the state . . . if there be no such law, or if no effect be given it by the state court, *we cannot take jurisdiction*, no matter how earnestly it may be insisted that the court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted . . . that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired . . . Dismissed." *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U.S. 632 (1912)

"The court did not purport to rely upon . . . any subsequent legislation for the result. It *did not purport to enforce any later law* . . . Therefore on the face of the decision there is no warrant in coming here . . . Writ of error dismissed." *Fisher v. City of New Orleans*, 218 U.S. 438 (1910)

"This court, therefore, has *no jurisdiction* to review a judgment of the highest Court of a state, on the ground that the obligation of contract has been impaired, *unless some legislative act of the state has been upheld* by the judgment sought to be reviewed . . . Now, if the state court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair

the obligation of a contract. And it is also clear that we cannot inquire whether the Supreme Court of Maine was right in that opinion . . . when the state court decides against the right claimed under a contract, and there was no law subsequent to the contract, this Court clearly has no jurisdiction." *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U.S. 18 (1887)

No legislative enactment subsequent to the purported contract having been considered, upheld, or relied upon to support the decision below this Court is without jurisdiction.

II. The Decision Below Was Correctly Decided Solely Based Upon Pre-existing State Constitutional Prohibitions Against Ad Valorem Exemptions.

Petitioner professes it had a "contract of exemption" from ad valorem taxation with the State of Oklahoma which has been impaired in violation of the Federal Constitution.

It is basic, yet critical, that a party asserting an unconstitutional impairment of contract establish clearly and conclusively both the existence and validity of the contract. *Tucker v. Ferguson*, 89 U.S. 527 (1875); *Vicksburg, Shreveport, and Pacific R.R. Co. v. Dennis*, 116 U.S. 665 (1886); *Perry v. Norfolk*, 220 U.S. 472 (1911).

"Where one relies on an exemption from taxation, both the power to exempt and the contract of exemption must be clear." *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938).

- A. The state court determined that state law in existence at the time the contract was allegedly made precluded contracts of exemption from ad valorem taxation and no federal question is herein presented.

Under Oklahoma law there can be no valid contract of exemption from taxation because such contracts have been, since statehood, expressly prohibited by state Constitution:

"The power of taxation shall never be surrendered, suspended or contracted away . . ." OKLA. CONST. art. 10 §5 (1907).

The trial court herein, based upon the aforementioned 1907 constitutional provision, ruled petitioners contract of exemption, even if clearly established, would be void and contrary to law:

"Article 10 § 5 of the Oklahoma Constitution prohibits a contract which surrenders, suspends, or contracts away the power of taxation and, although its existence is disputed, such contract, even if it could be established, would be void and contrary to law." Journal Entry of trial court (R. 703-704).

On appeal, the Supreme Court of Oklahoma, like the trial court, held that the exemption agreement, even if assumed to exist, would be void and unenforceable based upon 1907 state Constitutional provisions:

"We will now consider the enforceability of the alleged tax abatement agreement. G.M.C. did not introduce the agreement into the record. . . . We will assume, *arguendo*, that OIA, a state agency, entered into the tax abatement agreement with G.M.C. . . . the purported tax abatement contract was not in accord with Oklahoma law at the time it was made . . . The Federal Constitution does not protect unenforceable contract rights.

... The disputed agreement, even if it could be established, is *void* because no public official or public agency could constitutionally grant the tax exemption allegedly contained in the agreement. Since the alleged agreement is unenforceable, GMC is not entitled to the tax relief sought." (See Appendix A-6, A-12 to Petition for Writ of Certiorari herein.)

A cursory review of the opinion of the Court below readily reflects that, relying solely on the construction of 1907 state Constitutional provisions, the court held there could be no valid contract of exemption and the power to grant same was constitutionally foreclosed under Oklahoma law. No law subsequent to the alleged contract of exemption was at any time considered or enforced by the court below.

Since statehood the Oklahoma Constitution has unequivocally precluded the power and authority to grant exemptions from ad valorem taxation:

"The power of taxation shall never be surrendered, suspended, or contracted away . . ." OKLA. CONST. art. 10 §5 (1907).

"The legislature shall pass no law exempting any property in this state from taxation, except as otherwise provided in this Constitution . . ." OKLA. CONST. art. 5 §50 (1907).

"The legislature shall pass no law granting to any . . . corporation . . . any exclusive rights, privileges, or immunities within this State." OKLA. CONST. art. 5 §51 (1907).

"... nor shall the State . . . make donation . . . by tax, or otherwise, to any company, association, or corporation." OKLA. CONST. art. 10 §15 (1907).

"All property which may be taxed ad valorem shall be assessed for taxation . . ." OKLA. CONST. art. 10 §8 (1907).

This Court has itself ruled on numerous occasions that similar state Constitutional provisions preclude any contract of exemption protected by the "contracts clause." *Wells v. Savannah*, 181 U.S. 531 (1901); *Little Rock & Ft. Smith Ry. v. Worthen*, 120 U.S. 97 (1887); *Norton v. Shelby*, 118 U.S. 425 (1886); *Louisville & Nashville R.R. v. Palmes*, 109 U.S. 244 (1883); *Zane v. Hamilton County*, 189 U.S. 370 (1903).

"The Constitution of Tennessee . . . requires that all property shall be taxed. After that Constitution went into effect, no valid contract could be made with a corporation for an exemption from taxation . . . the legislature has no power to contract for relief from this burden." *Memphis & Charleston R.R. et. al v. Gaines* 97 U.S. 697 (1878)

"While we have never hesitated to vindicate the right of individuals or corporations to enforce the performance of lawful contracts as against subsequent legislation designed to impair them, we have always exacted as a condition that the contract was one which the legislature, or opposite party, had power to make under the Constitution . . ." *Yazoo & Mississippi Valley R.R. Co. v. Adams*, 180 U.S. 1 (1900), *reh. den.* 181 U.S. 580 (1901).

Under Oklahoma law as applied by the state court herein, a contract granting unconstitutional exemptions or privilege is void ab initio and can form no basis for contract. *Fullerton v. Hughes*, 145 P.2d 943 (Okla. 1944). Public officials have only such authority as is conferred upon them by law. *Shaw v. Grumbine*, 278 P. 278 (Okla. 1929).

Any exemption from taxation must have its genesis in the state Constitution as the legislature is constitutionally prohibited from granting exemptions from taxation not specifically authorized therein. *County Assessors v. Carpenters and Joiners Local No. 329*, 211 P.2d 790 (Okla. 1949); *Homestake Production Co. v. Board of Equalization*, 416 P.2d 917 (Okla. 1966). The power to tax or exempt, within permissible constitutional limitations, is a purely legislative power which cannot be delegated to any other authority or agency. *Board of County Comm'rs of Okla. Cty. v. Ryan*, 232 P. 834 (Okla. 1925); *In Re Thomas' Estate*, 136 P.2d 929 (Okla. 1943); *Myers v. Oklahoma Tax Commission*, 303 P.2d 443 (Okla. 1956).

And, under Oklahoma law, all citizens, including petitioners, are charged with notice of and bound by limitations on the authority of officials with whom they deal. *In Re Afton*, 144 P. 184 (Okla. 1914); *Hyde v. Altus*, 218 P. 1081 (Okla. 1923); *New Butler v. Tucker*, 153 P. 628 (Okla. 1915); *Gammil v. Shackelford*, 480 P.2d 920 (Okla. 1970); *State ex. rel. Tharel v. Bd. of Commr's of Creek County*, 107 P.2d 542 (Okla. 1940).

"So says the Supreme Court of the United States . . . 'No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents'." *Hawks v. Bland*, 9 P.2d 720 (Okla. 1932)

Petitioner was, therefore, properly charged with notice that no agency or official could constitutionally grant an exemption from ad valorem taxes.

Lastly, petitioner claims its "contract of exemption" from ad valorem taxation was with the "State of Okla-

homa" and thus subject to strict scrutiny because the state itself would financially benefit from abdication of the alleged contract. However, the state has no right, title, claim or interest in ad valorem taxes:

" . . . No ad valorem tax shall be levied for state purposes, nor shall any part of the proceeds of any ad valorem tax levy upon any kind of property in this State be used for State purposes . . ." OKLA. CONST. art. 10 §9 (1907).

While negating the basis for strict scrutiny this provision further evidences the lack of power of state officials, or the "State of Oklahoma", to grant ad valorem exemptions. Ironically, Petitioner admits that none of the proper taxing officials, the Respondents herein, ever agreed to ad valorem exemption (R. 472).

The Oklahoma Supreme Court gave no consideration whatsoever to any law enacted subsequent to petitioners alleged contract and, therefore, no federal question is presented and this Court is without jurisdiction.

B. Petitioner failed to establish the existence of a contract of exemption from ad valorem taxation.

Petitioners alleged contract of exemption is noticeably absent from the record in this cause as noted by the court below:

"We will now consider the enforceability of the alleged tax abatement agreement. GMC did not introduce the agreement in the record . . ." (See Appendix A-6 to Petition for Writ of Certiorari herein.)

Contracts of exemption must be established in clear and unmistakable terms, must expressly relinquish the taxing

power, cannot be implied or inferred, vague or ambiguous, and all doubts as to the contract are resolved against the exemption. *Tucker v. Ferguson*, 89 U.S. 527 (1875); *Seton Hall College v. South Orange*, 242 U.S. 100 (1916); *Vicksburg, Shreveport & Pacific R.R. Co. v. Dennis* (*supra*).

"We search in vain for any provision in the contract which expressly exempts the Corporation from payment of this tax, or indeed of any tax. Yet this is what is required before support can be obtained from the contracts clause . . . a business proposition involving the outlay of very large sums cannot be and is not taken by the parties concerned according to offhand impressions; it is scrutinized phrase by phrase and word by word." *New York Rapid Transit Corp. v. New York* (*supra*).

"If there be any doubt on these matters, the contract has not been proven and the exemption does not exist." *Wells v. Savannah*, 181 U.S. 531 (1901)

"There are no words which import such a contract . . . and none can be implied . . . If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect . . ." *People of New York et. al. v. State Board of Tax Commissioners*, 199 U.S. 1 (1905)

Oklahoma courts have likewise held that the burden of proof is upon the taxpayer to clearly establish a valid exemption from taxation with all presumptions against the exemption and provisions of law strictly construed. *Oklahoma City v. Shields*, 100 P. 559 (Okla. 1908); *Austin Nichols & Co. v. Okla. Cty. Bd. of Tax Roll Corrections*, 578 P.2d 1200 (Okla. 1978); *London Square Village, Inc. v. Okla. Cty. Equalization Bd.*, 559 P.2d 1224 (Okla. 1977); *Bert*

Smith Road Machinery v. Okla. Tax Comm., 563 P.2d 641 (Okla. 1977).

Petitioner admits that no Governor, Attorney General or tax official ever executed an agreement to exempt the property herein at issue (R. 473-474). Petitioner claims its nebulous, unwritten agreement arises from unspecified statements of public officials and civic organizations as well as the past failure of taxing officials to assess similar property. This Court found no contract under virtually identical assertions:

"This contract they say is evidence . . . by the statements of city officials . . . by the actual omission for a hundred years to tax these lots . . . The statements of officials, when the lots were sold, that they were not taxable, did not constitute a contract and . . . amounted to no more than the opinions of officials upon a question of law . . . mere nonuser by a government of its power to . . . tax, it matters not for how long continued, can never be construed into a forfeiture of the power . . . the mandate of the constitution . . . is to tax all property save that expressly exempted . . . the statements of officials . . . were nothing more than expressions of opinion, there being no evidence of any agreement on the part of the city or its duly authorized agents to exempt . . . On the contrary, there is evidence of an agreement to pay such taxes." *Wells v. Savannah (supra)*.

Curiously, the record in this cause, although devoid of any written contract of exemption, does establish an express agreement that petitioner would pay all ad valorem taxes assessed (Respondents statement, page 8). As recognized by the court below in its opinion:

" . . . the parties did agree that in the event the State of Oklahoma or any of its subdivisions shall demand the

payment of any general or ad valorem tax that GMC would pay the tax." (*See Appendix A-7 to Petition for Writ of Certiorari*)

This express agreement to pay ad valorem taxes assessed evidences such taxes were contemplated, agreed to, and negates any contract of exemption:

"Here, there is not only *no language of exemption*, but a *positive agreement* on the part of the lessee to pay the public taxes on the land. In compelling them to do so the contract is enforced instead of impaired." *J. W. Perry Co. v. Norfolk*, 220 U.S. 472 (1911)

"Not only is the Corporation unable to point to an unmistakable exemption, but the contract itself contains an express provision permitting the deduction of taxes from the gross receipts . . ." *New York Rapid Transit v. New York* (*supra*)

It is somewhat incredible, if not preposterous, that petitioner would advance an impairment argument while conspicuously withholding from the record the document most basic to their claim . . . the contract allegedly impaired . . . offering instead an agreement to pay ad valorem taxes assessed. This Court does not and should not consider hypothetical abstract questions of law.

III. Petitioners Have Failed to Specify Any Law Passed or Legislative Enactment Subsequent to the Alleged Contract Which Impaired Its Obligations.

Petitioners brief is vague and fails to clearly identify the specific "law" or "legislative enactment" upheld or considered by the court below and impairing its contract. Petitioner does make obscure references to "executive and judicial rulemaking." The clearest expression of the legis-

lative enactments complained of are in the "QUESTION PRESENTED" by petitioner wherein "an unforeshadowed Attorney General's opinion and State Court decision" are inferentially identified as the impairing enactments . . . if so, there is no federal question presented and, again, this Court is without jurisdiction.

A. An alleged impairment by judicial decision presents no federal question under the Contract Clause.

Petitioner asserts that the "contract clause" of the Federal Constitution is applicable to state executive and judicial action. In support of this fallacious contention petitioners cite *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1864) which this Court has expressly ruled *inapplicable* to cases involving alleged impairments of contract. In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924), this Court held that an alleged impairment of contract by judicial decision presents no substantial federal question:

"It has been settled by a long line of decisions that the provisions of . . . the federal constitution protecting the obligation of contracts, is directed only against impairment by legislation and not by judgment of courts . . . However, the fact that it has been necessary for this Court to decide the question so many times is evidence of persistent error in regard to it. Among the cases relied on to sustain the error are *Gelpcke v. Dubuque* [citations omitted] . . . these cases were not writs of error to the Supreme Court of a state. They were appeals or writs of error to federal courts . . . Had such cases been decided by the state courts however, and had it been attempted to bring them here by writ of error to the State Supreme Court, they would have presented no federal question, and this

Court must have dismissed . . . for lack both of power and jurisdiction . . . Certain unguarded language in *Gelpcke v. Dubuque* . . . and other cases has caused this confusion, although those cases did not really involve the contract of impairment clause of the Constitution . . . The mere reversal by a state court of its previous decision, as in the case before us, whatever its effect upon contracts, does not, as we have seen, violate any clause of the federal constitution. Plaintiffs claim, therefore, does not raise a substantial federal question. This has been decided in so many cases that it becomes our duty to dismiss . . . for want of jurisdiction." *Tidal Oil v. Flanagan* (*supra*).

This Court has consistently held that an alleged impairment by judicial decision of a state court presents no federal question and will not invoke this Courts jurisdiction. *Fleming v. Fleming*, 264 U.S. 29 (1924); *Cleveland & Pittsburg Ry. Co. v. Cleveland*, 235 U.S. 50; *Central Land Co. v. Laidley*, 159 U.S. 103 (1895); *Ross v. Oregon*, 227 U.S. 150 (1913); *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U.S. 632 (1912); *Kryger v. Wilson*, 242 U.S. 171.

B. Alleged impairment by Attorney General's opinion presents no federal question under the Contract Clause.

Petitioner further advances the novel theory of impairment by Attorney General's opinion. The Oklahoma Constitution provides that the legislative authority is vested in the legislature and the executive authority is vested in the Attorney General, among others, and none of the departments shall exercise power belonging to the other. OKLA. CONST. art. 5 §1, art. 6 §1 and art. 4 §1.

It is the mandatory duty of the Attorney General to give his opinion to public officials upon a proper request, but he is statutorily prohibited from rendering opinions to private parties. 74 O.S. §18b(e).

Petitioners rely upon *Grand River Dam Authority v. State*, 645 P.2d 1011 (Okla. 1982) for ostensible support of the proposition that an Attorney General's opinion is a "legislative enactment". Petitioner misperceives the holding of that case:

"... statutory provisions direct the attorney general to issue *advisory* opinions to state officials... Opinions sought are ordinarily confined to doubtful legal questions... for public officials' *guidance* until the questions concerning them are decided by the courts themselves... The attorney general is not authorized to issue written opinions to private... corporations,... The attorney general is authorized to issue an opinion on questions of law only at the request of certain public officials. *He does so, not in the exercise of any power inherent in the office to make 'rules' or law, but in fulfillment of his duty to give legal advice to those who administer the government of the state. It has never been held, nor is it suggested, that the attorney general may issue formal written opinions or settle questions of law on his own initiative.*" *Grand River Dam Authority v. State (supra)*

It has never been held that the Oklahoma Attorney General, in issuing legal opinions, enacts laws or that the powers are legislative.

It is, however, a somewhat academic issue as to the nature of an Attorney General's opinion. Even if this Court were to assume, *arguendo*, that an attorney general's opinion constituted a "law passed" by the state, or a "legislative enactment" still a federal question does not exist.

This Court has repeatedly held that unless the subsequent legislative act was upheld or formed the basis for the state court decision, it is immaterial, no federal question is presented, and this Court is without jurisdiction.

"... when the State Court gives no effect to the subsequent law, but decides on grounds independent of that law . . . the case stands as if the subsequent law had not been passed, and this court has no jurisdiction." *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.* 125 U.S. 18 (1887)

"But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction." *Cross Lake Shooting and Fishing Club v. Louisiana (supra)*

No attorney general's opinion was upheld, validated, considered nor used by the lower court as any part of the basis for its decision.

IV. The Record of These Proceedings Negates Any Valid Claim of Deprivation of Property Without Due Process.

The record herein reflects that upon assessing petitioner's property it was accorded a right to be heard and of full review before the County Board of Equalization, the District Court of Oklahoma County, and the Supreme Court of Oklahoma on appeal and two rehearings. Petitioner cannot seriously contend that in imposing taxes and finding its alleged contract unconstitutional there was any lack of due process.

"When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the

United States. . . Dismissed." *Central Land v. Laidley* (*supra*).

"Certainly where opportunity to be heard is afforded, as here, there can be no complaint for lack of due process of law." *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157 (1940).

Petitioner's invalid contract, if it exists, does not constitute a protected property interest and, even if it did, there was no denial of due process and thus no federal question is presented.

V. This Court Is Without Jurisdiction to Impose Equitable Remedies Not Constitutionally Compelled or to Review the Relief Accorded in an Action at Law Where No Federal Question Is Presented.

The bulk of petitioner's brief is argument related to retrospective-prospective application of the lower court's decision and restitution.

It must be observed at the outset that these *remedies* are *equitable* remedies and the instant cause proceeded as an action at law. Restitution was neither pleaded, requested, nor presented in the courts below.

No independent federal question is presented by a state court's denial of either retroactive or prospective application of its decision. This Court does not review remedies in the absence of a valid federal question nor impose equitable relief upon a court of law:

"We think the Federal Constitution has no voice upon the subject." *Great Northern Ry. Co. v. Sunburst*, 287 U.S. 358 (1932).

"However, we believe that the Constitution neither prohibits nor requires retrospective effect." *Linkletter v. Walker*, 381 U.S. 618 (1965).

The taxes sought to be assessed, and which petitioners protest, were not retroactive taxes. The lower court did not attempt to impose taxation retroactively to prior years. In any event, this Court has recognized that retroactive tax liability is the general rule:

"As to appellant's claim of retroactivity, little need be said. We have here at most a mere recomputation by the state of taxes payable under a statute which was existent throughout the whole period in question. Neglect of administrative officials, misunderstanding of the law, lack of adequate machinery have never been constitutional barriers to a state reaching backward for taxes. . . . types of retroactive tax legislation . . . have repeatedly been sustained by this Court, in recognition of the principle that *liability for retroactive taxes is "one of the notorious incidents of social life."* *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157 (1940).

This Court has no jurisdiction to review the relief afforded or to impose equitable remedies in an action at law arising from a state court where no federal question is present. Equity will not sanction that which was clearly illegal.

VI. The Decision Below Is Not of National or Wide-Spread Significance and Will Affect Few, If Any, Other Than the Parties Hereto.

At pages 18-21 of its brief, petitioner summarily asserts, without rational basis, that the decision below will jeopardize "contractual relations between private parties, and state governments . . . throughout the country."

The decision of the court below is founded on Oklahoma law and does not advance any novel legal con-

cept. This Court has repeatedly held that an exemption from taxation, unauthorized and prohibited by state constitution, is not enforceable. *Louisville & Nashville R.R. Co. v. Palmes*, 109 U.S. 244 (1883); *Keokuk & Western R.R. v. Missouri*, 152 U.S. 301 (1894); *Memphis & Charleston R.R. Co., et al. v. Gaines*, 97 U.S. 697 (1878); *Little Rock & Ft. Smith Ry. v. Worthen*, 120 U.S. 97 (1887); *Yazoo & Miss. Valley R.R. Co. v. Adams*, 180 U.S. 1, *reh. den.* 181 U.S. 580 (1900).

This Court has additionally recognized that taxation is basically a matter of "local policy". *Atlantic Coast Line Ry. Co. v. Phillips*, 322 U.S. 168 (1947); *People of New York v. Gilchrist*, 262 U.S. 94 (1923).

Further, petitioner expressly espoused in the court below that its alleged contract, and the facts regarding same, were "unique" to petitioner:

"The crucial issues involved in this litigation is the existence of a contract between G.M. and the State of Oklahoma. . . . [t]he negotiation for and the execution of the contract are *unique* to G.M. . . . These distinguishing and *unique* facts that constitute the contract between G.M. and the State of Oklahoma . . ." (R. 325, 327).

Recognizing that this Court's review is discretionary and frequently invoked because of wide-spread impact, petitioner feigns national significance where none exists. Few, if any, other than the parties hereto, will be affected by the decision of the Oklahoma Supreme Court and its decision is neither inconsistent with prior decisions of this Court nor novel in theory or application. *Wells v. Savannah*, 181 U.S. 531 (1901); *J. W. Perry v. Norfolk*, 220 U.S.

472 (1911); *Little Rock & Ft. Smith Ry. v. Worthen*, 120 U.S. 97 (1887); *Zane v. Hamilton County*, 189 U.S. 370 (1903); *S.R.A. v. Minnesota*, 327 U.S. 558 (1946).

CONCLUSION

Petitioner has presented no substantial federal question under the Due Process, Contract or Taking Clauses. There was no contract of exemption, no subsequent legislative enactment enforced and an express agreement by petitioner to pay taxes assessed. Petitioner has presented these issues throughout these proceedings and been fully heard thereon. There has been no denial of due process.

This Court should deny the requested writ.

Respectfully submitted,

LANA JEANNE TYREE

Counsel of Record

444 First City Place

Oklahoma City, Oklahoma 73102

Tel. (405) 239-2521

Counsel for Independent School

District No. 52 of Oklahoma

County, Oklahoma

March, 1984